IN THE

Supreme Court of the United States

October Term, 1964

No. 47

JAY GIACCIO,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

On Appeal from the Supreme Court of Pennsylvania.

MOTION TO DISMISS APPEAL OR LACK OF JURISDICTION BY APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1964
No. 831

Jay Giaccio,

Appellant

v.

Commonwealth of Pennsylvania,

Appellee

On Appeal From the Supreme Court of Pennsylvania.

MOTION TO DISMISS APPEAL

The Commonwealth of Pennsylvania, Appellee, moves your Honorable Court to dismiss the above-captioned appeal for the reason that no substantial federal question is presented.

WALTER E. ALESSANDRONI
GRAEME MURDOCK
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Attorneys for Appellee

QUESTIONS PRESENTED

Appellant's appeal should be dismissed for lack of jurisdiction because:

1. The Act of 1860 as construed by the Supreme Court of Pennsylvania is not vague or uncertain and no substantial federal question is presented.

2. Appellant's procedural due process argument raises no substantial federal question.

3. It is not a violation of the equal protection clause of the Fourteenth Amendment to treat misdemeanors differently from other classes of offenses.

STATEMENT OF THE CASE

The Defendant, Jay Giaccio, was indicted and tried on bills of indictment 225 and 226, September Sessions 1961 in the Court of Quarter Sessions of Chester County. Each of the above bills charged the misdemeanor of unlawfully and wantonly pointing and discharging a firearm at each of two different persons. This is a violation of the Act of June 24, 1939, P. L. 872, Section 716 (18 P.S. 4716).

At the trial of the case the Defendant represented himself, having refused the trial Court's offer to appoint counsel for him. The substance of the Defendant's defense was that the only firearm he had pointed or discharged at anyone was a blank starter pistol.

After hearing the evidence and due deliberation the jury returned a verdict of not guilty on each bill of indictment and ordered the County to pay the costs on Bill Number 226 and directed the defendant to pay the costs of prosecution on Bill Number 225.

Thereafter, with the assistance of the District Attorney's office, a petition to be relieved from the payment of costs was filed on behalf of the Defendant on April 21, 1962.

A hearing was had on Defendant's motion on April 27, 1962 and on June 13, 1962, James C. N. Paul, Esquire, and Peter Hearn, Esquire, appeared as counsel for the Defendant and filed a petition for rehearing. The petition was granted and argument had at

which time Defendant's counsel asserted the constitutional objections which are the basis for the present appeal.

On January 12, 1963, President Judge Gawthrop filed an opinion in the Court of Quarter Sessions of Chester County holding so much of Section 62 of the Act of 1860, P. L. 375 (19 P.S. 1222), as gave the jury power to place the costs on acquitted defendants in misdemeanor cases unconstitutional and ordered the sentence imposing costs vacated.

Thereafter the Commonwealth filed an appeal from that order and certiorari was directed to the Clerk of the Court of Quarter Sessions, Chester County, February 28, 1963.

On December 12, 1963, the Superior Court of Pennsylvania with only one judge dissenting reversed the order of the trial Court and reinstated the jury's determination as to the payment of costs.

The matter was then taken on appeal to the Supreme Court of Pennsylvania and on July 6, 1964 that court affirmed the order of the Superior Court with only one justice of the five participating in the decision dissenting.

Appellant then filed a Notice of Appeal to the Supreme Court of the United States.

The Appellant is not now and never has been confined.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS APPEAL

I. The Act of 1860[1] as Construed by the Supreme Court of Pennsylvania Is Not Vague or Uncertain and No Substantial Federal Question Is Presented

The void for vagueness argument raised by Appellant is relevant only if the interpretation and construction placed on the statute by the Supreme Court of Pennsylvania is ignored. Such construction and interpretation by the highest state court cannot be ignored by this court. The statute must be given the same construction placed upon it by a state Supreme Court. *Bandini Petroleum v. Superior Court,* 284 U. S. 8; *Musser v. Utah,* 333 U. S. 95; *Beauharnais v. Illinois,* 343 U. S. 25.

A. As construed by the Pennsylvania Supreme Court the Act of 1860 is not a penal act.

It is clear that under the law of Pennsylvania the costs of prosecution placed upon a party form no part of the penalty. *Commonwealth v. Soudani,* 193 Pa. Superior Ct. 353, 165 A. 2nd 709 (1960). As it is pointed out in the opinion of the Supreme Court of Pennsylvania (*Commonwealth v. Giaccio,* 415 Pa. 139, 202 A. 2nd 55 (1964)), the fact that in applying the

[1] Act of March 31, 1860, P. L. 427; Pa. Stat. Ann. tit. 19, section 1222, hereinafter the Act of 1860.

statute the courts have used such terms as "guilty of misconduct", "sentence" or "penalty" does not make the act penal. It is obvious that such phrases are used in the broad, rather than literal or technical, sense. Accepting the Pennsylvania Supreme Court's characterization of the statute, it is clear that the Act of 1860 need not be tested by the more rigorous standards applied to a statute creating a new substantive crime. Liability for costs under the Act of 1860 follows rather than precedes the disposition of the substantive offense.

B. Whether civil or penal in nature, the Act of 1860 as interpreted by the State Courts provides sufficient standards to satisfy the constitutional requirements of the Fourteenth Amendment.

The Appellant would have this court consider the bare bones of the Act of 1860 as standing alone and undefined. This is erroneous. In considering the specificity of a statute, it is not to stand by itself but is to be considered as a "part of the whole body of common and statute law of (the) state and to be judged in that context". *Musser v. Utah,* supra, page 97. This is what the Pennsylvania Supreme and Superior Courts did and their construction should be accepted. *Bandini Petroleum Co. v. Superior Court,* supra.

As the Pennsylvania court points out in its opinion in this case, the provisions of the Act of 1860 with regard to the placement of costs in misdemeanor cases must be read in conjunction with the statute creating the substantive offense for which the defendant was prosecuted. A defendant is not arrested, indicted,

and tried for being guilty of "some misconduct". He is before the court for committing a statutorily well defined misdemeanor. The jury makes its determination limited by the strict rules of evidence applied to criminal cases. It is clear that as the Pennsylvania Courts construe the Act of 1860 "the costs of trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence before the jury". *Commonwealth v. Giaccio,* supra. Just as in the instant case Pennsylvania juries have been charged in accord with that interpretation.

There is no question that the Act of 1860 is flexible, but it is flexible only in that it applies to all types of misconduct which precipitates an indictment and trial for well-defined misdemeanors. It would be virtually impossible to construct a statute which would in detailed language cover every situation in which it might be desirable to relieve the community of the burden of costs where there has been an acquittal, so the Pennsylvania legislature has given the jury some guided discretion as to where to place the costs. The fact that the jury must judge the behavior of the defendant and the prosecutor is in no way fatal to this statute. *Nash v. U. S.,* 229 U. S. 373.

The Act of 1860 as construed by the state court and as applied by the jury is no more objectionable or vague than the statute and procedure approved by this court in *Roth v. U. S.,* 354 U. S. 496, where it was held reasonable for the jury to apply the common conscience of the community to limit the meaning of the words obscene and lewd in a federal ob-

scenity statute. In that case, as in the instant case, it is the jury's judgment as to whether the standard of behaviour for the community has been breached.

The impact of the Act of 1860 upon criminal defendants would not seem to have been nearly as burdensome as portrayed by Appellant when one considers that this act or a one similar has been in force in Pennsylvania since 1805 and it was not until the instant case that any constitutional objection was attempted to be raised against it.

A consideration of the common law roots of the Act of 1860 makes its provisions considerably less unique or shocking. At common law in Pennsylvania, the defendant though acquitted always paid the costs. *Commonwealth v. Tilghman*, 4 Sargeant and Rawle 126 (Pa. 1818). Contrary to present practice, at common law the state never paid the costs, *U. S. v. Gaines*, 131 U. S. CLXIX, Appx., 25 L. Ed. 733. The Act of 1860 creates no new liability or penalty but rather allows the jury to relieve defendants of a common law burden. There is no doubt that the Pennsylvania legislature has not gone as far as other states in relieving the common law rule but this is a matter for the legislature, not the courts.

II. Appellant's Procedural Due Process Argument Raises No Substantial Federal Question

Appellee believes that Appellant's procedural due process objections as they relate to vagueness and fair notice are covered in Part I of this brief. With regard to Appellant's objection that no separate hearing on the issue of costs is provided for by the Act of 1860, it is our belief that this objection was passed on by this court in *Lowe v. Kansas,* 163 U. S. 81. In that case this Court considered and approved a Kansas statute which allowed the jury to place the costs on the *prosecutor* in a criminal libel action without any separate hearing on the issue of costs. The Court in considering this question approved the state court's rationale that "the prosecuting witness was so connected with the state in the trial of the prosecution that he was not entitled to a separate trial by jury upon the question of liability of costs" (163 U. S. 82). It is submitted that the procedure under Act of 1860 provides ample opportunity for the defendant to be heard.

The trial court has the traditional common law power to set aside the jury's placement of costs on an acquitted defendant. *Commonwealth v. Bixon,* 67 Pa. Superior Ct. 554 (1917). Such power lodged in the courts provides an effective safeguard against capricious action by the jury. In addition, there is appeal from the action of the trial court as is so amply demonstrated by this case.

III. It Is Not a Violation of the Equal Protection Clause of the Fourteenth Amendment To Treat Misdemeanors Differently From Other Classes of Offenses

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It is submitted that the states have a wide latitude and discretion to classify and treat crimes and offenses. It would serve no purpose to belabor the obvious and it suffices to say that the historical and actual differences between misdemeanors and felonies justify a state's different treatment of them and such different treatment in no way violates the equal protection clause. *Skinner v. Oklahoma,* 316 U. S. 535. With regard to summary cases, no jury is present and the task of assigning costs is left to the Magistrate.

CONCLUSION

Because of the foregoing, it is respectfully requested that this Court should deny probable jurisdiction and dismiss the appeal in this matter.

Respectfully submitted,
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April 25, 1965